SUPREME COURT, U. S.

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1968

No. 1072

WILLIAM NICHOLAS KARCHER
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONSTITUTIONAL PROVISIONS INVOLVED

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IN THE

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UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 25, 1968. The Petitioner filed a timely Motion for Rehearing on December 9, 1968 (Tr. 333). Petition for Rehearing was denied by the Court on December 26, 1968. On January 23, 1969 Petitioner moved this Court to extend the time for the filing of the Petition for Writ of Certiorari. Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, entered an order extending the time for the filing of the Petition for Writ of Certiorari from the 25th day of January, 1969 to the 20th day of February, 1969.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit attached in Volume 2, Page 330, is reported in 404 F.2d 343 (1968).

JURISDICTION

The Supreme Court of the United States has jurisdiction to entertain the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit pursuant to 28 United States Code § 1254(1). That the legal question presented to this Court was raised in the original trial held in the United States District Court in and for the Southern District of Florida by counsel's objection and Motion for New Trial during the course of trial (Tr. 5 through 31). The legal question was again presented to the United States Court of Appeals for the Fifth Circuit as reflected by Point II of the Points on Appeal.

The Appellate Court determined the question as reflected by the opinion filed on the 25th day of November, 1968 (Tr. 330).

QUESTIONS PRESENTED

1. Whether the Petitioner was denied his constitutional guarantee against self incrimination as guaranteed under the Fourth and Fifth Amendments of the Constitution of the United States and in violation of Miranda v. Arizona, 384 U. S. 436 (1966).

2. Whether the Petitioner was denied a fair trial as guaranteed by the Fourth, Fifth and Sixth Amendments of the United States Constitution because of the action and prejudicial conduct of the Assistant United States Attorney during the course of trial.

3. Whether the action of the Assistant United States Attorney during the course of trial was an illegal search and seizure and in violation of the Petitioner's rights as guaranteed by the Constitution of the United States, Amendment IV.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Amendments Four, Five and Six of the Constitution of the United States.

STATEMENT

An indictment was returned against the Petitioner charging a violation of 18 U. S. Code § 2114 in that he did rob Loretta Colson of money and property of the United States at the Northside Center Branch of the United States Post Office located in Miami, Florida in the approximate amount of $233.00 while she had lawful control and custody of same (Tr. 291). The Petitioner was tried on December 20, 1967 in the United States District Court in and for the Southern District of Florida before a twelve-man jury and was convicted of the violation of

Title 18, U. S. Code § 2114. During the course of the trial the Assistant United States Attorney approached the Petitioner, who was seated at the counsel table, seized his hand which was below said table, and attempted to raise it in order to show the witness and the jury a ring allegedly on his finger (Tr. 6 through 35). Counsel for the Petitioner immediately objected to the actions of the Assistant United States Attorney and moved for a mistrial (Tr. 7). The jury was excused and the trial judge suggested that he had not seen such action previously in a courtroom, but did not know if it was prejudicial. After further conversation the jury was brought back into the courtroom and the Assistant United States Attorney requested directly to the Petitioner that he hold his hand up in order for the witness to examine an object allegedly on his hand (Tr. 14). Objections were then made again before the trial court which were denied (Tr. 32). The Court in considering its decision to deny the Motion for Mistrial and the prejudicial conduct of the Assistant United States Attorney, relied upon the cases of **Holt v. United States,** 218 U. S. 245 (1910), 54 L.Ed. 1021 and **R. B. Schmerber v. California,** 384 U. S. 757.

The fact that in **Holt,** supra, the Supreme Court of the United States emphasized that the Court could order certain acts by a defendant during the course of trial and did not make mention of the right of an Assistant United States Attorney to order certain acts was overlooked by the United States Court of Appeals. The trial court and the lower court both accepted the position that the **Schmerber** decision required a defendant to do what was ordered of him at any time after arrest.

In the **Schmerber** case the court emphasized that probable cause is required before a seizure may take place. This position was embedded in judicial decisions but overlooked entirely by the lower courts. **Johnson v. United States,** 333 U.S. 10, 92 L.Ed. 436, 68 Sup.Ct. 367. The protection of the Fourth Amendment against illegal search and seizures forbids any intrusion on the mere chance that desired evidence might be obtained. **Schmerber v. California,** 384 U.S. 757-770, 16 L.Ed. 908-919, 86 Sup.Ct. 1826 (1966).

Immediate objection was made to the seizure of the defendant's hand by the prosecutor during the course of trial. The fact that the trial court specifically made its ruling on the basis of **Holt** and **Schmerber** and that said positions were reaffirmed on the basis of said cases was a misapplication of this court's directives. The lower court's ruling emphasized:

> "... While the conduct of the prosecuting officer in raising the defendant's right hand to permit the prosecuting witness to see the ring he was wearing was not excusable, we do not think it created prejudicial error. See **R. B. Schmerber v. California,** 384 US 757; **Holt v. U.S.,** 218 US 245."

The fact that the appellate court questioned the conduct of the prosecutor during the course of the trial reflected a grave concern upon the entire proceedings and presented the obvious question whether inexcusable conduct is not prejudicial conduct and therefore denies the defendant a fair and impartial trial.

REASONS FOR GRANTING THE WRIT

The issues presented in this Petition concern the very protections afforded by the Constitution of the United States in the field of criminal law. The subject matter which has been brought before this Court and through this Court's countless decisions has almost to the point of tradition been considered of great public importance justifying, where warranted, the assumption of jurisdiction of this Court by Writ of Certiorari. This Court on numerous occasions has emphasized the protection of a defendant during the course of trial. This Court has prescribed and set forth guidelines concerning the scope of examination of prosecutors during the course of trial. This matter is of grave public interest because the interpretation of the **Schmerber v. California,** 384 US 757, 16 L.Ed. 908, 86 Sup.Ct. 1826 (1966) and **Holt v. U. S.,** 218 US 245 (1910), 54 L.Ed. 1021, by the lower courts could remove the very safeguards that this Court has enumerated on countless occasions through constitutional protections enumerated in Amendments Four, Five and Six of the Constitution of the United States. The lower courts interpretation that the Assistant United States Attorney has a right to direct, order, or seize the person of the defendant on trial without permission of the court strikes at the very essence of a fair trial. Herein the lower courts reliance upon an adoption of the principles announced in **Schmerber** and **Holt** to the fact situation presented in this matter requires this court to reiterate the constitutional protections during the course of trial of a defendant.

An important question of federal trial practice is presented to this court which has not been previously ruled

upon, but which should be settled by this court. As further reasons for the granting of the Writ of Certiorari we respectfully submit that the court below has decided a federal constitutional question in conflict with both the nature and spirit of applicable decisions of this court and has removed the protection to the defendant that this court had previously granted to every individual.

CONCLUSION

The decision below is erroneous in that it misinterprets the spirit and intent that this court has applied in numerous decisions. The protection of a defendant during the course of trial must be zealously guarded by the trial court and any act or actions on the part of an Assistant United States Attorney which prevents a fair trial must be prevented. The Fifth Circuit in its affirming the conviction of the Petitioner overlooked the fact that inexcusable conduct before a jury and prejudicial conduct before a jury are one in the same.

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to the Solicitor General of the United States, Washington, D. C., on this 19th day of February, A. D. 1969.

By: Jack J. Taffer

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APPENDIX

APPENDIX

APPENDIX A-1

TRANSCRIPT OF RECORD

VOLUME II

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19__

No. _____

WILLIAM NICHOLAS KARCHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 12, 1968

WILLIAM NICHOLAS KARCHER

No. 25879 versus

UNITED STATES OF AMERICA

On this day this cause was called, and after argument by Jack J. Taffer, Esq., for appellant, and Theodore Klein, Asst. U. S. Attorney, for appellee, was submitted to the Court.

APPENDIX A-2

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25879

WILLIAM NICHOLAS KARCHER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(November 25, 1968)

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM: We conclude that the evidence as to identification of the appellant was ample to warrant submission of the case to the jury. While the conduct of the prosecuting officer in raising the defendant's right hand to permit the prosecuting witness to see the ring he was wearing was not excusable, we do not think it created prejudicial error. See *R. B. Schmerber v. California,* 384 US 757; *Holt v. U. S.*, 218 US 245.

We find that there was ample basis for the trial court to conclude that the *Miranda* warning was properly given.

The judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25879

D. C. Docket No. 67-428-CR-TC

WILLIAM NICHOLAS KARCHER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 25, 1968

Issued as Mandate:

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25,879

WILLIAM NICHOLAS KARCHER,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(December 26, 1968)

ON PETITION FOR REHEARING

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be and the same is, hereby DENIED.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 4 — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5 — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6 — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1072

WILLIAM NICHOLAS KARCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 404 F. 2d 343.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1968. A petition for rehearing was denied on December 26, 1968. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to February 20, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the action of the prosecutor in raising petitioner's right hand to bring to the attention of a witness at trial a ring the petitioner was wearing deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on a one-count indictment of post office robbery (18 U.S.C. 2114). On February 8, 1968, he was sentenced to seven years' imprisonment.

On September 22, 1967, Mrs. Loretta Colson, a clerk on duty at a contract post office located at a shopping center in Miami, Florida, was robbed of $233 by a gunman who showed her a gun inside his jacket (App. 2–4, 43).[1] She identified petitioner as the robber (App. 2). After the robbery, the police showed Mrs. Colson "at least one hundred" photographs and she selected one of petitioner as being a picture of the robber (App. 34). Four days later, she picked petitioner out of a group of approximately twenty-five college students exiting from a classroom, and, subsequently, in the presence of petitioner's counsel, picked petitioner out of a five man lineup. She testified she recognized him "immediately" (App. 35–37). A few minutes before the robbery, the maintenance superintendant of the shopping center had occasion to see petitioner in the vicinity of the post office (App. 63–64). After the robbery, the superintendent selected petitioner's picture out of a group of two hundred shown to him, and he later picked petitioner out of a four or five man lineup (App. 63–64, 78).

Approximately ten minutes after the robbery, petitioner arrived at his college class, ten minutes late

[1] "App." refers to the petitioner's appendix in the court of appeals which is on file with the Clerk of this Court.

(App. 91). The driving and parking time between the post office and the college was nine minutes (App. 173).

Mrs. Colson testified that the robber had worn on his right hand a ring with a large stone (App. 5). The prosecuting attorney then asked "Like this (raising defendant's right hand)?" (App. 6). This procedure was objected to on constitutional grounds (App. 6–14), as was a later prosecution request that petitioner hold up his hand (App. 14–33). The court instructed the jury to disregard these efforts (App. 14, 33–34), but thereafter permitted Mrs. Colson to state that at trial she recognized the ring petitioner wore on his right hand (App. 34).

ARGUMENT

Drawing Mrs. Colson's attention to the ring that petitioner was wearing at trial was not in derogation of petitioner's right against self-incrimination (see Pet. 2). At trial, without taking the witness stand, a defendant may be required to put on an article of clothing (*Holt* v. *United States,* 218 U.S. 245), to furnish his fingerprints (*United States ex rel. O'Halloran* v. *Rundle,* 384 F. 2d 997 (C.A. 3), certiorari denied, 393 U.S. 860), to stand (*Roberson* v. *United States,* 282 F. 2d 648 (C.A. 6), certiorari denied, 364 U.S. 879), and to display a facial scar (*Winiecki* v. *United States,* No. 1640, Misc., O.T. 1967, Certiorari denied, 392 U.S. 938). In the present case, the ring was merely an article of clothing which petitioner voluntarily chose to wear at this trial. Clothing items are neither testimonial nor communicative in nature.

Warden v. *Hayden,* 387 U.S. 294, 302–303; *Schmerber* v. *California,* 384 U.S. 757.

Since petitioner voluntarily wore the ring, the prosecutor's action in directing Mrs. Colson's attention to it did not constitute a search and seizure in violation of the Fourth Amendment (see Pet. 5). A ring worn by a defendant at a public trial is on public display and it is not a violation of that amendment for a witness to observe that which is readily apparent. *United States* v. *Lee,* 274 U.S. 559; *Harris* v. *United States,* 390 U.S. 234; cf. *Katz* v. *United States,* 389 U.S. 347; See *United States* v. *Richardson,* 388 F. 2d 842 (C.A. 6).

While the prosecutor's action in raising petitioner's hand to show the witness the ring instead of requesting petitioner to display it may have been inappropriate, it was hardly prejudicial. As this Court has noted in *Schmerber* v. *California,* 384 U.S. 757, 764 and in *United States* v. *Wade,* 388 U.S. 218, 223, both federal and state courts have usually held it is proper to compel submission to fingerprinting, photography, or measurements, or to require a defendant to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. See *Gilbert* v. *California,* 388 U.S. 263.

In any event, the identification of the ring was merely a corroborative detail. Petitioner had been positively identified as the robber by Mrs. Colson and support for her identification was given by the shopping center maintenance superintendent and by pe-

titioner's late arrival at class shortly after the robbery. Moreover, petitioner made affirmative use of his ring to show that Mrs. Colson was mistaken as to its color, and hence as to her identification of him (App. 176, 180, 181, 204, 209, 219, 270; Defense Exhibit 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
EDWARD FENIG,
Attorneys.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969